

MOTION FILED
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-1468

M. MORRIN & SON COMPANY, INC., *Petitioner*,
v.
BURGESS CONSTRUCTION COMPANY, et al., *Respondents*

MOTION BY THE UTAH CHAPTER OF THE
ASSOCIATED GENERAL CONTRACTORS OF AMERICA
FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF AMICUS CURIAE

KING & KING, CHARTERED
JOHN A. McWHORTER
HAROLD I. ROSEN
VAL S. McWHORTER
1320 19th Street, N.W.
Washington, D. C. 20036

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Amicus, Utah Chapter of the Associated General Contractors of America, hereby moves for permission to file an amicus brief in this case. This motion is being filed under Rule 42(3) because, while Amicus has been advised by counsel for petitioner that it has no objections to the filing of a brief amicus, respondent has not indicated its consent.

This case involves, *inter alia*, the interpretation of a contract clause involving site availability of a type often found in construction contracts. Perhaps more importantly, it involves a matter of paramount significance to any construction contractor—the contractor's right to timely access to the construction site.

The essential interest of Amicus is to relate to the Court the conflicts between the decision of the Circuit

Court and other judicial precedent and to explain the ramifications of that decision upon the construction industry. While noting possible procedural irregularities by the District Court, Amicus will not address that issue or other issues or the merits of the parties' underlying claims except to the extent affected by the Circuit Court's interpretation and application of the site availability clause.

Amicus is an organization of contractors who perform all types of construction work. Its geographical base includes the state of Utah. Its membership presently includes approximately 380 member companies. The Associated General Contractors of America is a recognized spokesman in and for the construction industry.

Amicus believes it is uniquely qualified to demonstrate to the Court the importance to the construction industry of the Circuit Court's interpretation and application of the particular contract clause. While Amicus does not question the parties' ability to present their limited concerns adequately to the Court, Amicus believes that the broad public interest involved in the case may be overshadowed by the specific interests which bring these parties to the Court. For this reason, the request for permission to file an amicus brief should be granted.

Respectfully submitted,

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PRELIMINARY STATEMENT

Amicus is an organization of Utah contractors with approximately 380 member companies who perform all types of construction work. It is a recognized spokesman for the Utah construction industry. Amicus requests leave to file a brief amicus curiae because the case centers on the interpretation of a construction contract clause concerning site availability commonly found in construction contracts. That interpretation will have an effect on contractors throughout the nation. Amicus has a further interest in that the decision was rendered on first impression by the United States District Court for the District of Utah and affirmed on appeal by the United States Court of Ap-

peals for the Tenth Circuit (526 F.2d 108), and therefore the case has special added implications to Utah construction contractors. The intent of Amicus is to relate to the Court the conflicts between the decision of the Circuit Court and decisions of the United States Court of Claims and to explain the ramifications of that decision upon the construction industry.

QUESTION PRESENTED

Where the parties enter into a contract on the basis of a scheduled time of performance, which time period is to commence on a contractually anticipated site availability date, is the failure by one party to the contract to make the site available at the established date, thus changing the period and schedule during which the work is to be performed, a breach of contract?

ARGUMENT

The contract out of which this action arises contains the following clause:

Section 4. TIME OF PERFORMANCE: The Subcontractor agrees to keep himself informed as to the progress of the project and to faithfully prosecute his work, and the several parts thereof, at such times in such order as the Contractor considers necessary to keep the same sufficiently in advance of the other parts of the project and to avoid any delay in the completion of the construction as a whole. The scheduled TIME OF PERFORMANCE of the work forming a part of this Subcontract is See Exhibit B.

Exhibit B provides as follows:

Time for completion of this work shall be as follows:

1. Concrete in lower tunnel, stilling basins and lower trash rack shall be complete to allow diversion of river through tunnel on or before 1 August 1971 subject to:

- a. Lower tunnel excavation must be complete to allow access from both ends by 1 April 1971.
- b. Excavation for lower tunnel chute and the stilling basins for both chutes must be completed by 1 April 1971.
- c. Gates and steel liners for lower gate chamber must be delivered on or before 15 May 1971 and installed not later than 1 June 1971.

The subcontractor will be entitled to a time extension equal to any delay created by a, b or c above.

The time of performance of construction work is an essential ingredient to any construction contract, and clauses similar to the above clause are commonplace throughout the industry.

The focal point of construction cost estimating is the time during which the work will be performed, including both the duration of the required work effort and the scheduled dates for performing the work. The establishment of a defined performance period benefits the construction contractor in that he can more accurately estimate the costs that he will incur in performing the work. Moreover, the establishment of construction dates benefits the other contracting party because it allows that party to enter into a contractual payment obligation based on the reasonable fixed cost expectation of the contractor who will perform the construction contract work, without excessive contingencies.

Whenever reasonably anticipated construction dates are not met, an impact on construction costs occurs. Therefore, the adherence to contractually established site availability dates is of primary significance to the contractor. Most importantly, that is why the courts should not negate one contracting party's obligation to timely furnish the construction site to the other party at the time contemplated in the contract.

The United States Court of Claims has recognized the importance and binding nature of contractually established site availability dates in a leading case, *Merrit-Chapman & Scott Corp. v. United States*, 194 Ct. Cl. 461 (1971). There, the contract called for the construction of a lock and dam in an area occupied by a state highway. The state highway was to be relocated by another contractor, and the work site could not be disturbed until the relocation was complete. In establishing the construction schedule for the lock and dam contractor, the following clause was included in the contract:

SC-20 ORDER OF WORK—(a) * * * The Contractor is informed that no part of existing State Highway 7 shall be removed until the relocated highway is opened to traffic, *which will be about 1 December 1955.* * * * [Emphasis supplied]

Contrary to the above clause, no part of the existing highway was released to the contractor until much later than the December 1, 1955 date. Based on the above contract language, the Court of Claims held (at 472-473):

On the claim itself, the first thing to say is that *the contract unequivocally represented that old Highway No. 7, running right through the center*

of the construction site, would be made available when the relocated highway was opened to traffic, which "will be about 1 December 1955." This flat declaration meant that the plaintiff could rightly expect the old route to be given to it no later than a few days after December 1st, and it could rely on having the road available to it by that time.

* * *

In the light of this schedule, the Board correctly concluded in its first decision that "[t]he only possible reason for inserting this date [about 1 December 1955] was to give the contractor a basis for planning and thus reduce the contingency that would otherwise have to be considered." The Board further said, again correctly, "that the Government represented [Court's emphasis] that the old highway would be available about 1 December 1955 and assumed the risk for delays beyond this period * * *." [Emphasis supplied]

There is likewise no serious question that the Government omitted to live up to this promise. The bulk of the road was not handed over to plaintiff until April 14, 1956, and the rest not until June 26, 1956.

When the defendant was unable to fulfill its warranty, it, of course, failed in a legal obligation. This would have been a breach of contract and actionable, in the absence of a clause such as the "Suspension of Work" article. That provision is designed for the very purpose of purging the Government of the consequences of what would otherwise be a breach by substituting a claim "redressable under the contract." The failure to hand over the road amounted in effect to a partial suspension of the work by the Government—a stopping by the Government of excavation in that area. It makes no difference, since a suspension actually occurred, whether or not the Government

was negligent in meeting its obligation to provide the road; the representation was that the road would be available, not simply that the defendant would use its best efforts. See *Abbett Elec. Corp. v. United States*, 142 Ct. Cl. 609, 616, 162 F. Supp. 772, 776 (1958). * * *

While it is understood that relief was granted the contractor in *Merritt-Chapman & Scott* under the "Suspension of Work" clause of the contract, the Court made it quite clear that, absent such clause, the Government's action would have constituted a breach of contract.

The same principle was applied by the Court of Claims in *Abbett Electric Corporation v. United States*, 142 Ct. Cl. 609 (1958). There, the contract specified that a notice to proceed would be issued to the contractor within 240 calendar days. Another contractor was still performing preceeding work in the needed work area at the end of the 240 day period, so the Government issued the notice to proceed but then told the contractor that it would have to delay its performance. The Court of Claims held that the failure to make the site available at the end of the 240 day period was a breach of contract regardless of whether the Government "might not have been negligent in meeting its obligations under the contract * * * ." (at p. 616)

In *George A. Fuller Company v. United States*, 108 Ct. Cl. 70 (1947), the contractor for the construction of the National Archives Building was required to construct ornamentation work in accordance with sculptural carving and ornamentation models which were being made by another contractor under separate contract. The models were not available for the con-

struction contractor when he needed them. While the contract did not provide specific dates by which the models were to be furnished, the Court of Claims found that the late furnishing of the models was a breach of contract. In this regard, the Court of Claims stated (at p. 101):

* * * In the case at bar we think the Government did agree to furnish these models as soon as the contractor needed them. We are of the opinion that it was an implied obligation on the part of the Government not to delay the contractor's work by a failure to furnish it the models as required, and that if it did so, it is liable to it for the consequent damages. We do not believe the Supreme Court intended by its decision in the *Foley* case to overrule its numerous prior decisions so holding.

We think that the Government when it agreed to furnish the models without condition was bound to furnish them on time as much as if an express provision to this effect had been incorporated in the contract, and that if it failed to do so it breached this provision of the contract and is therefore liable for any damages resulting therefrom.

The present case is not dissimilar. The contract provided by its express terms a "SCHEDULED TIME OF PERFORMANCE" and that scheduled time of performance was no less binding than the obligations imposed on the contracting parties by the contracts involved in *Merritt-Chapman & Scott*, *Abbett Electric* and *George A. Fuller*. Because of the failure to timely make the site available, the work could not be carried out in accordance with that contractually scheduled time of performance. As a result, a breach of contract occurred.

It is not enough to conclude in the circumstances that the breach was rectified by a mere time extension. While the time extension provision may be relevant to the assessment of liquidated damages, it is not a remedy for a breach of contract. In this regard, it has been held that the provision for a time extension in the event of delay does not operate as a bar to the recovery of increased costs incurred as a result of the delay. *George A. Fuller Co. v. United States, supra* at 96-97, and cases cited therein.

CONCLUSION

For the foregoing reasons, it is submitted that the decision of the Circuit Court is erroneous, conflicts with judicial precedent of the United States Court of Claims and will have far ranging ramifications within the construction industry. Wherefore, it is submitted that certiorari should be granted.

Respectfully submitted,

KING & KING, CHARTERED
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